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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 94

UNITED STATES,

Petitioner,

vs.

N. Y. RAYON IMPORTING CO., INC. (=2), AND ALFRED L. ROSE, NORMAN S. GOETZ, WALTER MENDELSOHN AND BERNARD D. LANG, AS LIQUIDATING DIRECTORS AND TRUSTEES OF N. Y. RAYON IMPORTING CO., INC. (=2)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the Court of Claims (R. 21-29) is officially reported in 64 F. Supp. 684.

Jurisdiction

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27) and the petition for certiorari was filed on April 30, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

Question Presented

The question presented is whether the Court of Claims in granting judgment in favor of respondents in an action to recover the amounts determined to be owing by the United States under two judgments of the United States Customs Court entered April 30, 1937 and May 6, 1937, respectively, properly awarded interest to the respondents from a date subsequent to the date of said prior judgments under the provisions of the Act of March 3, 1875, as amended, 31 U. S. C. 227, dealing with interest when a judgment is unpaid.

Question Not Presented

At the outset, we wish to point out that the Government has not presented the question accurately in stating that the issue before this Court is the applicability of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, which deals with interest on original claims against the Government. We have never relied on that statute. The only issue before this Court is the applicability of the Act of March 3, 1875, as amended, 31 U. S. C. 227, which deals with interest on judgments and which, strangely enough, is mentioned by the Government only in a footnote near the end of its brief.

Statute Involved

The Act of March 3, 1875, as amended, 31 U. S. C. 227, dealing with interest when a judgment is unpaid, provides as follows:

> "Sec. 227. Offsets against judgments against United States.—When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comp-

troller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

Statement

The facts are not in dispute and were found by the Court of Claims as follows:

Respondent, N. Y. Rayon Importing Co. Inc. (#2) (hereinafter called "Rayon #2") is the successor to two other corporations, N. Y. Rayon Importing Co. Inc. (#1) (hereinafter called "Rayon #1") and Nyrayco Importing & Converting Corporation (hereinafter called "Nyrayco"), which recovered judgments in the United States Customs Court against the United States on April 30, 1937 and May 6, 1937 (R. 16). Respondents, Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, are the

liquidating directors and trustees of Rayon #2 (R. 20). As a result of said Customs Court judgments, it was determined that $393,292.46 was owing by the United States (R. 16).

Checks were issued between August 4, 1937 and February 3, 1938 aggregating $393,292.46 (R. 16) but their delivery was withheld on the excuse that respondent Rayon #2 and its predecessor corporations Rayon #1 and Nyrayco had all been dissolved.

Notwithstanding the fact that the New York statutes dealing with dissolved corporations expressly permitted such corporations to sue to collect their assets through their liquidating directors (New York General Corporation Law, § 29) the checks were withheld by the Comptroller General of the United States (R. 17).

In 1938, a formal petition was filed with the General Accounting Office requesting that the checks be delivered but the General Accounting Office refused to deliver the checks either to Rayon #2, or to Rayon #1 or Nyrayco, and instead deposited the proceeds of the checks in the Treasury in the fund entitled "Outstanding Liabilities, 1938" (R. 17).

In a further effort to satisfy the Comptroller General a declaratory judgment was obtained by consent in the New York Supreme Court which adjudicated that Rayon #2 was the owner of the judgments and refunds. The Comptroller General still refused to approve any payment thereof although a copy of the judgment and a new demand were sent (R. 17).

In a still further effort to satisfy the Comptroller General, on February 26, 1943, the attorneys for Rayon #2, Rayon #1 and Nyrayco wrote the Comptroller General again requesting that payment be made to Rayon #2 and suggesting, in the alternative, that the Comptroller General

might make payment to Rayon #1 and Nyrayco and their respective liquidating directors, with the consent of Rayon #2 (R. 17, 18), Rayon #2 being the sole stockholder of Rayon #1 and Nyrayco (R. 14). The Comptroller General nevertheless again refused to make payment (R. 18).

Finally three actions in the Court of Claims were instituted on April 29, 1943 by Rayon #2 and its liquidating directors, by Rayon #1 and its liquidating directors, and by Nyrayco respectively. The actions were consolidated and tried together (R. 20).

Although the Government had had the matter under consideration since 1937, on the trial it offered no evidence of any kind to controvert the evidence (basically documentary) given on behalf of the plaintiffs..

The findings of the Hearing Commissioner were not excepted to by the Government.

In its brief and argument before the Court of Claims, the Government did not dispute the succession by Rayon #2 to all the assets of Rayon #1 and Nyrayco, including the customs refund claims. Moreover the Government conceded its obligation to pay the judgments of $362,482.17 based on the custom refunds of Rayon #1, payment of which the Comptroller General was withholding without color of justification.

As to the judgments based on the claims of Nyrayco aggregating the much smaller sum of $30,809.75, the Government took the technical position that these judgments were void because entered in the Customs Court after Nyrayco's involuntary[1] dissolution for nonpayment of taxes in 1935 (a dissolution which had occurred five years after Nyrayco's transfer of all its assets to Rayon #2).

[1] This objection was not made as to the judgments in favor of Rayon No. 1 since that corporation had been voluntarily dissolved (R. 15).

It is not surprising that the Court of Claims overruled this legally unjustified objection (the propriety of which ruling the Government does not now question), and that it entered judgment in favor of Rayon #2 for the entire amount of the previous judgments, aggregating $393,292.46, with interest. The only surprising thing is that the Court of Claims allowed interest only from April 19, 1941, instead of from 1938 when payment of the judgments was withheld by the Comptroller General.

By the time the judgment in the Court of Claims was entered on February 4, 1946, the Government had had the use of the $393,292.46 paid to it as excessive customs duties for more than seventeen years, the last payments of duties having been made in 1929 (R. 10).

ARGUMENT

Point I

The ruling of the Court of Claims in awarding interest was correct under the authority of the Act of March 3, 1875, as amended, 31 U. S. C. 227 and numerous decided cases.

We do not dispute the principle that the Government is not liable to pay interest on claims against it *in the absence of statutory provision.*

Our contention is that express statutory provision for interest *on an unpaid judgment,* where payment is withheld by the Comptroller General, is found in the provisions of the Act of March 3, 1875, as amended, 31 U. S. C. 227.

The Government virtually ignores this statute, discussing it only in a footnote (Brief p. 13), and instead sets up a straw man by proceeding to a lengthy discussion of Section 177(a) of the Judicial Code (28 U. S. C. 284), dealing with interest on *original* claims against the government.

(a)

Section 177(a) of the Judicial Code Applies Only to Suits on Original Claims; Actions Based on Pre-existing Judgments Against the Government Are Controlled by the Act of March 3, 1875, as Amended, 31 U. S. C. 227.

As stated, *supra*, page 2 we have never claimed that our situation fell within Section 177(a) of the Judicial Code, 28 U. S. C. 284, since this action in the Court of Claims was based on pre-existing judgments.

The prohibitions against the granting of interest and exceptions thereto contained in Section 177(a) of the Judicial Code refer only to *original claims* which have not previously been reduced to judgment.[2] Where a valid judgment had previously been entered against the Government, the Act of March 3, 1875, as amended, 31 U. S. C. 227, provides for interest on the judgment if it is found that payment is withheld improperly by the Comptroller General.

In *Stewart & Co.* v. *United States*, 71 C. Cls. 126 (1930) the Court of Claims in allowing interest *after* a judgment under the Act of March 3, 1875, 31 U. S. C. 227, held Section 177 (a) of the Judicial Code, 28 U. S. C. 284, to be inapplicable, writing (p. 131):

> "The words 'no interest shall be allowed on any claims up to the date of rendition of judgment by the Court of Claims' we think were intended to apply to suits on the original claim."

If Section 177 (a) of the Judicial Code applies to actions on pre-existing judgments, 31 U. S. C. 227 is meaningless.

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[2] In *Tillson* v. *United States*, 100 U. S. 43; *United States* v. *Verdier*, 164 U. S. 213, 218; and *United States* v. *North American Co.*, cited by the Government (pp. 12, 15), interest was not sought on a judgment against the United States but on the original claim.

(b)

Under the Provisions of 31 U. S. C. 227, Interest is Allowable on Unpaid Judgments, the Payment of Which is Wrongfully Withheld by the Comptroller General.

Under 31 U. S. C. 227, where payment of a judgment is withheld by the Comptroller General in the exercise of his statutory duty because he believes the United States owns a cross-indebtedness, interest must be paid from the date of withholding, if it is ultimately found that no such cross-indebtedness exists.

Thus, under the statute interest runs against the United States on judgments allowed by legal authority, regardless of the Comptroller General's good faith and reasonableness in withholding payment (*American Steam Conveyor Corp. v. United States*, 10 F. Supp. at 577).

The policy behind the Act of March 3, 1875, 31 U. S. C. 227 was well stated in *United States v. New York, C. & St. L. R. Co.*, 32 F. (2d) 887, 890 (CCA 6th, 1929), where, in allowing interest on a sum of money owing to the plaintiff, payment of which had been disapproved in good faith by the Secretary of the Treasury, Moorman, C. J., wrote:

> "This allowance of interest which the statute makes was obviously intended as compensation to the claimant for the unauthorized withholding of the payment of his claim."

The same policy was stated in *American Potash Co. v. United States*, 80 C. Cls. 160, 166, 8 F. Supp. 717, 719 (1934), where Littleton, J., wrote:

> "The whole purpose of the Act was to compensate a claimant by way of interest on an amount which had been allowed by legal authority for the time during which it was wrongfully withheld from him."

Congress has clearly indicated a policy that once a judgment of a competent court has been entered against the United States, a plaintiff should not be further denied his money without the accrual of interest.

A fortiori, if the Comptroller General withholds payment of the amount of any final judgment recovered against the United States *without even claiming that a cross-debt is owing by the plaintiff to the United States*, interest on the amount of the final judgment should be paid for the period payment has been withheld.

American Potash Co. v. *United States*, 80 C. Cls. 160, 8 F. Supp. 717 (1934), is squarely in point. In this case the Commissioner of Internal Revenue had determined that the plaintiff was entitled to a refund of $105,432.89 and check in this amount, dated May 17, 1930, was mailed to the plaintiff. On June 17, 1930, the Comptroller General of the United States stopped payment on the check. The Comptroller General withheld payment on the ground that the plaintiff *might* be indebted to the United States on account of taxes for other years and continued to withhold payment until June 12, 1931. Having determined that no cross-indebtedness existed on this latter date, the Comptroller General authorized payment of the refund to the plaintiff in the above sum and the check which had been withheld was delivered to the plaintiff. Plaintiff then sued in the Court of Claims for interest from the date of the check to the date on which the Comptroller General finally approved of payment and was awarded judgment under the provisions of the Act of March 3, 1875, 31 U. S. C. 227.

One of the arguments urged by the United States in the *American Potash* case in opposition to the claim for interest was that since there had been no formal claim of cross-indebtedness and no adjudication of that point, the delay being due simply to a reasonable investigation of the Comptroller General as to the possibility of such indebtedness, the

case did not fall within the literal language of the Act of March 3, 1875. This argument was repudiated by the Court, Littleton, J., writing (80 C. Cls. 160, 165-166, 8 F. Supp. 717, 219):

> "In our opinion the plain provisions and obvious purpose of the Act of 1875 negative this contention * * *. *The whole purpose of the Act was to compensate a claimant by way of interest on an amount which had been allowed by legal authority for the time during which it was wrongfully withheld from him, if it should be ultimately determined that he was not otherwise indebted to the United States.* The case at bar clearly comes within these provisions, for the amount here involved was withheld in the hope that some indebtedness of the plaintiff might be found against which it could be applied. *In our opinion, this is even a stronger case for the allowance of interest than one where a definite indebtedness is claimed by the Government to exist in its favor and it is prosecuted to final judgment.*"

The decision in the *American Potash* case was never appealed by the Government and the policy enunciated therein was apparently acquiesced in by the Government.

Yet the Government in the instant case has urged (Brief p. 13) that 31 U. S. C. 227 does not apply here because no set-off was asserted by the United States. In the Court of Claims, the Government made the same argument, urging that respondents had not proved the existence of what it claimed were essential conditions and writing in its brief below:

> "The Act of March 3, 1875, as amended by the Act of March 3, 1933, by its terms prescribes the following conditions which must be met before interest is recoverable under it: (1) the claimant must have a final judgment against defendant and present it to the Comptroller General for payment; (2) the Comptroller General must withhold payment of the judgment by

way of set-off of some claimed indebtedness of the claimant to defendant; (3) the claimed indebtedness of the claimant to defendant must be reduced to suit; (4) in such suit judgment must be rendered against defendant either in the whole or part of the amount withheld by the Comptroller; i. e., the set-off must be adjudicated invalid in whole or in part."

It is undisputed in the instant case that final judgments against the Government were entered in the United States Customs Court, that they were presented for payment to the Comptroller General, and that the Comptroller General withheld payment erroneously. Surely, if, as the Government admits, interest must be paid on judgments where payment is withheld by the Comptroller General in the justifiable but erroneous belief that there is a set-off, interest should *a fortiori* be paid where the withholding is found to be without justification and where there is not even a claim of set-off.

Other cases in addition to the *American Potash* case have allowed interest under 31 U. S. C. 227, even though all these conditions were not present. (*American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, 10 F. Supp. 571, cert. denied 296 U. S. 599; *United States* v. *La Grange Grocery Co.*, 31 F. 2nd 297 (D. C. Ga.).

Thus, in *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, 10 Fed. Supp. 571, cert. denied 296 U. S. 599, the Commissioner of Internal Revenue determined that the plaintiff was entitled to a tax refund of $13,544.49 and certified the refund to the Comptroller for payment. The Comptroller General ordered payment of this entire sum of $13,544.49 withheld because of an alleged off-set of $112.58, which although disputed by the plaintiff was finally deducted from the refund. The difference of $13,431.91 was eventually paid by the Comptroller General, but without interest. The plaintiff then instituted action

to recover interest on the $13,431.91 for the period withheld. Judgment was rendered for the plaintiff under 31 U. S. C. 227, Green J., writing (81 C. Cls. at 164, 10 F. Supp. at 577):

> "We find nothing in this case which takes it out from under the provisions of this statute allowing interest on the overpayment from the time it was allowed until paid. *It is urged in argument on behalf of the defendant that the Comptroller General acted within a reasonable time. For the purposes of the argument this may be conceded* although the government's claim was a specific and liquidated one. *But the plaintiff was deprived of the use of a sum of money, which at all times after the allowance of the claim, was admitted to be due and owing to it. It is only fair and just that it should receive compensation* therefor and if the act be construed not to provide for compensation under such circumstances it becomes of little benefit to the parties which the act was intended to relieve. We think that under a reasonable construction of the act the plaintiff is entitled to recover interest on the amount withheld from the time the refund was allowed up to the time it was paid."

In *United States* v. *La Grange Grocery Co.*, 31 F. (2d) 297 (D. C. Ga.) the General Accounting Office refused to pay a tax refund that was concededly due to the La Grange Grocery Co. because of an alleged offset and caused an action to be instituted to recover the amount alleged to be due the United States. The defendant counter-claimed for the amount due on the tax refund. Pending the action the Government abandoned its claim and sent a check for the refund due. The Court awarded judgment to the defendant for the interest upon the amount improperly withheld under 31 U. S. C. 227 notwithstanding the fact that no judgment was entered against the Government dismissing its claim.

(c)

Judgments of the Customs Court Are Judgments Within the Meaning of 31 U. S. C. 227

There is no reason why in applying the provisions of the Act of March 3, 1875, 31 U. S. C. 227, a judgment of a Customs Court should be treated any differently from a judgment of any other court of the United States.

In *David L. Moss Co.* v. *United States*, 103 F. (2d) 395, 397, the Court referred to the functions of the Customs Court and wrote:

> "The court is a court of law, and it is granted full power to relieve against illegality in the assessments or collection of duties 19 U. S. C. A. §§ 1515, 1518. If relief may not be had before it against illegal actions under the flexible tariff provisions relief may not be had anywhere for its jurisdiction in such matters is exclusive."

In *Brooks* v. *Mandel-Witte Co.*, 54 F. (2d) 992, 994, the Court wrote:

> "A final order or decree of the Customs Court, sustaining or overruling a protest, is in the form of a declaratory judgment and a direction to the Collector, as the tariff acts require, to reliquidate the entry accordingly."[3]

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[3] The Government suggests that the Act of March 3, 1875 applies only to "money judgments" and contends that the judgments of the Customs Court were declaratory judgments (brief, p. 13). There is no such technical distinction in the statute; moreover, the judgments of the Customs Court were in effect money judgments. The provision contained in the judgment of that Court for reliquidation of the customs entries is simply a direction that a mere ministerial function (towit, mathematical computation of the amount due) be performed, similar to the computation of costs and interest made by the Clerk of the Court in an action at law.

Just as interest may be awarded under 31 U. S. C. 227 on judgments secured against the United States on account of illegal collection of taxes, payments of which judgments were improperly withheld by the Comptroller General (e.g.: *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 743, 3 F. Supp. 662, cert. denied 290 U. S. 670) so too, interest is allowable against the United States on judgments for the refund of illegally collected customs duties, payment of which has been improperly withheld by the Comptroller General.

(d)

The Customs Regulations and Cases Cited in a Footnote by the Government are Irrelevant.

Reference is made in a footnote in the Government's petition (page 13) to certain regulations of the Treasury Department providing that interest is not allowed on customs claims.

These customs regulations are wholly irrelevant since they pertain to original customs claims, not to interest after judgment is entered—a matter governed by statute. Respondents do not claim interest from the period 1925 to 1929 when the customs duties were paid under protest and the claims filed, but claim interest only from 1938 when the claims were merged in judgments and payment withheld by the Comptroller. Moreover, the Court of Claims allowed interest only from 1941.

The cases cited in the same footnote, *Stephani's* case, 26 Int. Rev. Rec. 313, 314, and *White* v. *Brown*, 10 Fed. 80, are likewise not in point, for the Act of March 3, 1875 (31 U. S. C. 227) was not cited in those cases and was inapplicable since the judgments there involved were (a) not

judgments against the United States but against individual Collectors and (b) payment of the judgments had not been withheld by the Comptroller General (or, as the statute then provided, by the Secretary of the Treasury). Moreover, in *United States ex rel. McLeod* v. *Sherman*, 98 U. S. 565, the issue arose prior to the enactment of the Act of March 3, 1875.

(c)

A Writ of Certiorari Should be Denied to the Government.

The Government's petition presents no novel question.[4] Respondents believe that no public interest will be served by a review of the decision below which has been shown to be in accord with all prior decisions. The provisions of the Act of March 3, 1875, as amended (31 U. S. C. 227) have been interpreted by the courts on numerous occasions and the cases cited in this brief granting interest on an unpaid judgment under this statute are only a few of the many cases where interest has been allowed under this statute.

Conclusion

The decision of the court below is correct; indeed, it is too favorable to the Government (see respondents' cross petition for certiorari). The statute in question has been frequently and consistently construed contrary to the Government's contentions and no question of general interest

[4] The Government has cited another recent decision of the Court of Claims (*Thayer-West Point Hotel Co.* v. *United States*, 74 F. Supp. 636) where interest was granted and in which certiorari is being sought. That case does not bear the faintest resemblance to the instant case since it did not involve the allowance of interest on a judgment, the question involved here.

is presented. It is, therefore, respectfully submitted that the Government's petition for a writ of certiorari should be denied.

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